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CONSTITUTIONAL LIMITATIONS ON THE POWER OF A STATE OVER FOREIGN CORPORATIONS. — Under the federal constitution a state cannot exclude from its territory a foreign corporation desiring to engage in interstate commerce.[1] It would seem, however, that such a corporation can be prevented from carrying on its intrastate business,[2] while a corporation purposing solely an intrastate business can be entirely excluded.[3] As a corollary of the latter rule, conditions may be attached to entrance into the state;[4] the corporation may be ejected if it removes a suit to the federal court;[5] and it may be compelled to submit, as a condition precedent to its entry, to the payment of a license fee based upon its property outside the state,[6] on which it has a constitutional right not to be taxed.[7] Therefore, when it was sought to oust the local business of two foreign corporations, long engaged in interstate commerce within the state, because the

[1] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Cooper Manufacturing Co. *v.* Ferguson, 113 U. S. 727; Crutcher *v.* Kentucky, 141 U. S. 47.

[2] Pullman Co. *v.* Adams, 189 U. S. 420; Allen *v.* Pullman's Palace Car Co., 191 U. S. 171.

[3] Pembina Consolidated Silver & Mining & Milling Co. *v.* Pennsylvania, 125 U. S. 181; Hooper *v.* California, 155 U. S. 648; Waters Pierce Oil Co. *v.* Texas, 177 U. S. 28; National Council *v.* State Council, 203 U. S. 151.

[4] Paul *v.* Virginia, 8 Wall. 168. An entry under such conditions forms a contract which the state cannot impair. American Smelting Co. *v.* Colorado, 204 U. S. 103.

[5] Doyle *v.* Continental Insurance Co., 94 U. S. 535; Security Mutual Life Insurance Co. *v.* Prewitt, 202 U. S. 246. But a corporation cannot contract not to remove a cause to the federal court. Barron *v.* Burnside, 121 U. S. 186; Southern Pacific Co. *v.* Denton, 146 U. S. 202.

[6] Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

[7] Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194; Galveston, Harrisburg, & San Antonio Railway Co. *v.* Texas, 210 U. S. 217.

corporations refused to pay a tax on their entire capital stock as a condition of their doing, or seeking to do, business within the state, the statute levying this tax was held unconstitutional not without a vigorous dissent. *Western Union Co.* v. *Kansas*, 216 U. S. 1; *The Pullman Co.* v. *Kansas*, 216 U. S. 54. *Cf. State of Arkansas* v. *Western Union Telegraph Co.*, 30 Sup. Ct. 280.[8] Likewise, against authority,[9] one justice took the position, that the exclusion of the intrastate business of a foreign corporation, engaged also in interstate business, is a direct clog on interstate commerce. Undoubtedly the court recognized the coercive effect of this statutory use of the lawful powers of the state with an unreasonable condition attached.[10] But it is submitted that the dissenting opinion presents the only logical conclusion to be deduced from the cases above considered, in which the power to oust the local business was not defeated because the broken condition was the waiver of a constitutional right.

It was argued that, as a corporation is a person within the meaning of the Fourteenth Amendment,[11] and as these corporations had been doing business within the state, the statute was in conflict with that amendment.[12] But the due process clause has never been considered as limiting the power of the state over the property of foreign corporations doing a purely local business.[13] However, another recent decision on an Alabama statute, similar to those above considered, holds that a foreign corporation is entitled to the equal protection of the laws. *Southern Railway Co.* v. *Green*, 30 Sup. Ct. 287. Necessarily, therefore, the corporation in question was considered to be within Alabama.[14] But the Supreme Court has rigidly adhered to its early *dictum* that a corporation cannot exist outside the jurisdiction of the law that created it,[15] although deciding that at common law it can acquire rights and liabilities extra-territorially through its agents.[16] In the Kansas and Arkansas cases the corporations were acting in this manner, but the corporation in the Alabama case had previously complied with certain statutory requirements, such as the usual stipulations of consent to being sued. Thus, as the law now stands, the compliance with any statutory requirements places the corporation within a foreign jurisdiction;[17]

[8] This case gives relief by injunction against a similar statute.

[9] Pullman Co. *v.* Adams, *supra* (evidence that the interstate business did not pay, excluded).

[10] The effect of conditions attached to the entry of foreign corporations has been held unlawful: the privileges of citizens of other states cannot be destroyed (Blake *v.* McClung, 172 U. S. 239); nor can a contract between a corporation and a third person be impaired (Bedford *v.* Eastern Building & Loan Association, 181 U. S. 227); nor a contract with the state (Erie R. R. Co. *v.* Penn., 153 U. S. 628). *Cf.* American Smelting Co. *v.* Colorado, *supra.*

[11] U. S. *v.* Amedy, 11 Wheat. (U. S.) 392.

[12] The liberty of artificial persons is not protected under this amendment. Northwestern Life Insurance Co. *v.* Riggs, 203 U. S. 243; Western Turf Association *v.* Greenberg, 204 U. S. 359. *Quaere*, as to the life of a corporation.

[13] Horn Silver Mining Co. *v.* New York, *supra.* (The corporation in this case had been doing business within the state.)

[14] "No state shall . . . nor deny to any person *within its jurisdiction* the equal protection of the laws." Constitution of the United States, Amendment XIV.

[15] Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 588. *Cf.* Horn Silver Mining Co. *v.* New York, *supra*, 314.

[16] Bank of Augusta *v.* Earle, *supra.* The numerous cases in state courts are collected in BEALE, FOREIGN CORPORATIONS, § 111, n. 2.

[17] See as to the effect of non-compliance with statutory conditions, 22 HARV. L. REV. 593.

but if it acts under the common law, the corporation has not yet left the state of incorporation.[18]

All the difficulty over these constitutional questions arises from theoretical views advanced by the Supreme Court; to say that a corporation cannot migrate, and to speak of excluding a foreign corporation from a state, leads to confusion of thought. It is submitted that the power of a state to create domestic corporations and limit their powers is of the same nature as the power to refuse to recognize the existence, or limit the powers of, foreign corporations; that is, the power of a sovereign over corporate action.[19] If this is so, since the state can admittedly exact any condition, even a so-called unconstitutional one, as a prerequisite to incorporation,[20] it may attach any condition to the legalizing of corporate action within its territory by a foreign corporation.[21] And, moreover, as soon as the state has legalized corporate action, the corporation on which it has thus acted is a person within the jurisdiction. Therefore the Kansas and Arkansas cases cannot be supported on any ground,[22] while the Alabama case is but a new extension of the Fourteenth Amendment.

CONTROL OF DIRECTORS OF A CORPORATION UNDER A PARTNERSHIP AGREEMENT BETWEEN STOCKHOLDERS. — Since a corporation can act only through individuals, directors are elected to manage the corporate affairs, in whom the powers of the corporation are usually vested by statute or charter.[1] Only a few corporate acts of a fundamental nature, such as an increase in the shares of stock or a change in the business of the corporation, require assent by the stockholders.[2] The directors become, however, the agents of the corporation and not of its individual members.[3] It is apparent, therefore, that any control by stockholders over corporate acts must be exercised indirectly, either by the election of the directors, or through the courts.[4] In matters of judgment or business policy the directors may act uncontrolled by the courts;[5] but where they are about to commit

[18] The latter point was decided in National Council *v.* State Council, *supra*, in which it was said of such corporations: "Those within the jurisdiction in such a sense, as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws." And *cf.* St. Clair *v.* Cox, 106 U. S. 350.

[19] Substantially decided in the Alabama case, since the distinction between taxing a domestic corporation for being a corporation and taxing a foreign corporation for the privilege of doing business within the state was held an arbitrary classification.

[20] Ashley *v.* Ryan, 153 U. S. 436.

[21] If the Supreme Court had adopted this view, it would have allowed the state to exclude a corporation engaged in interstate commerce. The entire subject was thus one for Congress, not the courts. See 23 HARV. L. REV. 456, 463.

[22] But *cf.* 23 HARV. L. REV. 441, 450.

[1] Hopkins *v.* Roseclare Lead Co., 72 Ill. 373, 379; Rollins *v.* Clay, 33 Me. 132, 139; Hutchinson *v.* Green, 91 Mo. 367.

[2] Chicago Railway Co. *v.* Allerton, 18 Wall. 233; Stokes *v.* Continental Trust Co., 186 N. Y. 285.

[3] Smith *v.* Hurd, 12 Met. (Mass.) 371.

[4] Flynn *v.* Brooklyn City Railway Co., 158 N. Y. 493; Cann *v.* Eakins, 23 Nova Scotia, 475; Dana *v.* Bank, 5 Watts & S. (Pa.) 223, 247. Pullman Car Co. *v.* Missouri Pacific Railway Co., 115 U. S. 587, 596.

[5] Automatic Self Cleaning Co. *v.* Cunninghame, 22 T. L. R. 378; McCloskey *v.* Snowden, 212 Pa. 249.